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No. 94 - 1150

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1994

ALSTON R. KEENER,
Petitioner

v.

EXXON COMPANY, USA, and
EXXON CORPORATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF SERVICE STATION DEALERS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an irrebuttable presumption of statutory compliance may be read into the Petroleum Marketing Practices Act, 15 USC 2801 et.seq., enforcement provision, 15 USC 2805, where the language of the statute, contains no such presumption

2. Whether interpretation of the Petroleum Marketing Practices Act generally, and its "offer" provisions specifically, is guided by economic realty and market analysis, or by judicially created presumptions ?

TABLE OF CONTENTS

Questions Presented.....i
Table of Contents.....ii
Table of Authorities... iii
Interest of Amicus..... 1
ARGUMENT..... 6
Background of the PMPA..7
Structure of the PMPA...13
The Offer Issues.....15
Enforcement Issues.....20
Summary and Conclusions.25

TABLE OF AUTHORITIES
CASES

Barnes v. Gulf Oil,
795 F.2d 358 (4th Cir.1986).....
7,8
824 F.2d 300 (4th Cir.1987).....
4,6,13,28
Brach v. Amoco Oil Co.,
677 F.2d 1214 (7th Cir.1982).....
24

Darling v. Mobil Oil Corp.
864 F.2d 981 (2nd Cir. 1989).....
16,18

Eastman Kodak v. Image Technical Services,
112 S.Ct. 2061 (S.Ct. 1992).....3

Ellis v. Mobil Oil Corp. ,
969 F.2d 784 (9th Cir. 1992).....32

Hilo v. Exxon Co. USA,
997 F.2d 641 (9th Cir.1993).....

30,31,32,33

J. Truett Payne v. Chrysler Motors Corp.
451 U.S. 557 (1985)..... 26,27

Reyes v. Atlantic Richfield Co.,
12 F.3rd 1464 (9th Cir. 1993).....14,27

Slatky v. Amoco Oil Co.,
830 F.2d 476 (3rd Cir. en banc 1987)....3,4,5,11,12,16,19,25,26,27

Spectrum Sports v. McQuillen
112 S.Ct. 2072 (1992).....
3

Sun Refining & Marketing Co. v. Rago,
741 F.2d 670, 673 (3rd Cir. 1984).....14,16,18,26,27,28,29

STATUTES & LEGISLATIVE HISTORY
15 USC2802(a).....13,14

15 USC 2802 (b)(1)..... 21

15 USC 2802 (b)(2).....8

15 USC 2802 (b)(3)(d)....10,14

15 USC 2802 (c).....3,,16,
17
15 USC 2805 7

15 USC 2805 (c).....7,9,13

1978 U.S.Code Cong. & Ad. News

.....3,21,23

House Report # 100-1100..... ..22

Cong. Record
April 5, 1977
p. 10378,83....10,11,12,13

May 5, 1978 p. 12761,
62..... 6, 7

MISCELLANEOUS

Note, 32 Emory L.J.273..... 10

INTEREST OF THE AMICUS IN HAVING THE WRIT GRANTED

The Service Station Dealers of America is a trade association that through its network of state affiliates serves as the voice of America's 50,000 gasoline retailers.

To one of the SSDA's members, rights under the PMPA generally, and the right to buy the station a dealer is leasing if the franchisor decides to sell it, specifically, is the most precious right a dealer can have. For many of our members it is the culmination of a dream - to not only have his or her own business, but to own the station real estate as well.

In order to ensure that right, the SSDA has been at the forefront of each of the leading PMPA cases

construing the PMPA's "offer" provisions.

The nation's major oil companies ares selling off properties in droves, driven primarily by environmental considerations, and a desire to focus marketing in geographic areas where there already exists significant penetration.

For example, Exxon has reduced its number of lessee dealers by over 20% in the last two years alone.

Under the PMPA, when Exxon decides to sell a station property, it must either make a bona fide offer to sell what the statute calls "its interests in the leased marketing premises"; or allow the dealer the right of first refusal with respect to

such an offer made by another.

In this case, Exxon solicited bids from branded distributors known as "jobbers", in this case, DeFazio Oil Company.

Exxon provides its distributors with a number of benefits, that it does not make available to dealers such as Petitioner. These include financing for station and upgrades through a program called "Tiger Mac"; and lower wholesale fuel costs known in the industry as "rack prices".

Another economic effect of the challenged practice is that Keener and similarly situated franchisees will be forced to pay a premium in the form of goodwill or business value created by their own labor, a premium above the

fair market value of the "franchisors interest in the leased marketing premises" , i.e. the value of the land, which is what the plain language of the statute requires the franchisor to offer the franchisee.

In a nutshell, the majority of the 4th Circuit panel would simply eschew any economic analysis; avoiding such analysis by creating a presumption of franchisor compliance with the statute; that is nowhere to be found in the language or even in the legislative history.

The 4th Circuit ruling is in conflict with that of other Circuits which have consistently held that any offer based in whole or in part on the dealers' goodwill is not bona fide as

a matter of law and thus violates the PMPA. See, e.g., Ellis v. Mobil Oil Corp., 969 F.2d 784, @ 788 (9th Cir. 1992).

The PMPA is unique because it shifts the burden of proof to the franchisor; and uses a relaxed standard for injunctive relief that does away with the requirement that the franchisee show either irreparable harm or a probability of success on the merits.

As demonstrated infra, the panel majority of the 4th Circuit would turn the statute on its head, by creating a strong, indeed irrebuttable presumption of statutory compliance.

The panel majority did precisely what the Court warned in J.Truett

Payne v. Chrysler Motors Corp., 451 U.S. 557; 101 S.Ct. 1923 (1981) should not be done: judicially engrafting onto a statute what Congress refused to do.

The legislative history shows that oil companies generally; and Exxon specifically, strongly protested the decision of Congress' decision to shift the burden of proof to the franchisor.

The net effect of the action of the panel majority is to return the burden of showing statutory non-compliance to the small dealer, a burden Congress relieved dealers of for a variety of reasons, including the disparity of resources with respect to the international oil

giants, the same reasons that produced the unique injunction standard.

In addition, the SSDA is concerned because the opinion of under review creates far more conflict within the Circuits than that set forth in the Petition.

In addition to the 2nd and 9th Circuits as set forth in the petition, the decision under review conflicts with decisions of the 3rd, 8th and 10th Circuits with respect to the proper level of scrutiny of oil company offers.

The fundamental reason why this conflict exists is that the panel majority chose to characterize Exxon determination of an offer price as "sound business judgment that should

not become a casualty of constant judicial oversight."

The critical distinction missed by the panel majority is that the decision to sell the property and the offer are scrutinized under different standards, a distinction carried over in the enforcement provisions.

" The determination of an offer price therefore represents something we may call a "compliance judgment", a judgment about how to best protect the company's interests while complying with the statute. CONGRESS DID NOT INSTRUCT THE COURTS TO DEFER TO SUCH DECISIONS."

Slatky v. Amoco Oil Co. 830 F.2d 476 at 481 (3rd Cir. in banc)

Slatky has been followed by every

other Court to consider the issue.

Finally, the SSDA has long been concerned with proper interpretation of trade regulation statutes such as the antitrust laws and the PMPA. SSDA has filed a number of briefs with the Court; some of which have been cited in the opinions.

SSDA has always adhered to the position that interpretation of such statutes must be guided by economic reality, as this Court has so often stated.

This opinion is an attempt to inject into the PMPA the mode of analysis set forth in a law review article by the same author, at the expense of the language of the statute, its history and purposes,

sound economic analysis a law, and ultimately the members of the SSDA and the motoring public.

For these reasons, the SSDA urges granting the writ.

ARGUMENT

The Court again finds itself confronted with the situation presented in Spectrum Sports Inc. v. McQuillen;____ U.S._____; where a single Circuit Court is an isle of discord in a sea of harmony; because it had elected to apply a presumption that was not based in the language of the statute, that was utterly divorced from economic reality.

In Spectrum Sports the Court reversed a line of 9th Circuit Sherman Act Section 2 attempted monopolization

cases; that allowed a party to meet its burden in proof, by applying a baseless presumption that the specific intent and dangerous probability of success elements of the Sherman Act offense were met where certain per se Section 1 violations existed irrespective of proof of the relevant market or of market power.

The majority of the 4th Circuit panel fashioned a similar presumption, out of whole cloth as correctly noted by the dissent, in order that " a simple statutory provision not be turned into a complex and cumbersome one necessitating a detailed economic analysis of private decision making." 32 F.3rd @ 130.

This Court has consistently held

that in construing a trade regulation statute such as the PMPA, economic reality is the touchstone of the analysis, and theories such as the presumption formerly applied by the 9th Circuit in Section 2 cases; and that which the 4th Circuit panel majority would apply, cannot stand. See, e.g., Eastman Kodak v. Image Technological Services, 112 S.Ct. 2072 at 2082 (legal presumptions that rest on formalistic distinctions rather than ACTUAL MARKET REALITIES ARE DISFAVORED).

The economic reality is that the offer to the Exxon distributor was not the same as that offered to Keener, for at least three reasons. First, Keener did not have a supply of Exxon

gasoline available at all, much less one at the favorable "rack" price. Second, the Exxon distributor, DeFazio, would have available favorable financing deals through Exxon, such as "TigerMac".

Third, an Exxon distributor such as DeFazio, who planned to continue to operate the facility as a gas station, and further as an Exxon station would be willing to pay a premium for the property that represents the business value or goodwill generated by the franchisee; Keener. Thus the franchisee would be forced to pay for that which or he she created. The plain language of the statute states that what the franchisor must offer to the franchisee is its interests in the

leased marketing premises: i.e. its feehold or leasehold interest. See, Ellis v. Mobil Oil Corp., 969 F.2d 781 (9th Cir. 1992).

It is difficult to believe that DeFazio would offer 1.2 million for a piece of land that appraised at less than one half that figure; without the ongoing gasoline business.

In the name of quick disposition of cases, the panel majority held that economics do not matter. This creates conflict with other Circuits; and is contrary to decisions of this Court , as well as to the language and intent of the PMPA, to which we now turn.

I. Background of the Petroleum

Marketing Practices Act

" It is apparent from the legislative history [of PMPA] that Congress was responding to what it perceived as a pattern of abuse by major oil companies of their franchise relationships with petroleum retailers."

Note, Judicial Interpretation of the Petroleum Marketing Practices Act:Conflict & Diversity, 32 Emory L.Journal 273 (1983) at 274. (Hereinafter cited as Note, supra, Emory L.J.)

Oil companies such as Exxon argued that legislation regulating petroleum industry franchises was not necessary. Exxon further argued that the procedural protections provide by

the proposed PMPA; shifting the burden of proof and the relaxed injunction standard, should be deleted:

" It should impose on the franchisee as the moving party, not the franchisor, the burden of proof both at the temporary injunction level, and at a trial on the merits, as in any lawsuit." Hearings on H.R.130, Petroleum Marketing Practices Act, before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce, 95th Cong., 1st session. [1977]: (hereinafter cited as Hearings) (Testimony of Exxon Co. USA at page 208, 214).

Exxon and others argued against the procedural PMPA protections, as

well as the passage of the statute itself, arguing that a franchisor's economic interests provided a sufficient check on abusive conduct. These arguments were rejected. Congress, as well as the Courts. Thus, as stated by the Third Circuit in the only en banc decision ever decided under PMPA:

> "[T]he very act of passing the PMPA indicated Congress' rejection of the view advanced by the major gasoline retailers that remedial legislation was unnecessary because the interests of distributors and franchisees were in harmony."

Slatky v. Amoco Oil Corp., 830 F.2d 476 at 483 (3rd Cir. en banc, 1987). The explicitly stated purpose of the Act was to "provide for the protection of franchised distributors and retailers of motor fuel . . . and to

prevent deterioration of competition in gasoline marketing." (123 Cong.Rec. 4/5/77, p. H10378, Statement of Rep. John Dingell (the primary author of PMPA)).

Congress specifically intended to maintain independent retailers such as Petitioner as a competitive force in the marketplace. See,e,g. Note, supra, 32 Emory L.J. 273 at 281.

This specific concern of PMPA was echoed by Senator John Durkin, Chief Senate Sponsor and Floor Manager of the PMPA:

"MR. DURKIN: ... consumers can expect an advantage from the continued service provided by these dealers and the competition they create in the gasoline marketplace . . . . `Dealer day in court', as the bill is popularly referred to, is aimed at halting the steady decline in the numbers of small businessmen who can continue to compete in the retail

gasoline marketplace." 123 Cong.Rec. 5/5/78, p. S12761-62 [Statement of Senator John Durkin]. (emphasis added).

In order to achieve this goal Congress' prohibited oil companies from making offers or requiring dealers to meet offers which are not bona fide: i.e. at prices above the fair market value of the locations; or that include the goodwill value of the business; or are hinged with unreasonable conditions of sale. See, e.g. Ellis v. Mobil Oil Corp., 969 F.2d 784 (9th Cir. 1992); Slatky v. Amoco Oil Co., 830 F.2d 476 (3rd Cir. en banc 1987).

As the 9th Circuit stated in Ellis, the bona fide offer requirement serves as a second, distinct layer of protection for franchisees, in order

that they can continue to compete in accordance with the goals of the PMPA.

The panel claims that the primary purpose of the PMPA is to ensure that decision making does not become a victim of judicial oversight; a holding that would have astonished the drafters of this decidedly interventionist statute.

Though it restricted their actions, PMPA was intended to leave franchisors with some flexibility to respond to changing market conditions.

It was not the intent of Congress to allow this flexibility to subvert the primary purpose of the Act, franchise protection:

"... to assure that franchisees nevertheless receive the meaningful

protections which this Federal legislation is intended to provide **and to assure that this flexibility does not frustrate the purposes of this legislation, the bill utilizes very special enforcement mechanisms."** Cong. Record, p. H10383, April 5, 1977. [Statement of Chairman John Dingell, primary author of the PMPA.]

One of those "very special enforcement mechanisms" is the PMPA's shifting of the burden of proof, another is the relaxed standard for preliminary injunctive relief, USC 2805. Chairman Dingell continues:

" ... **to assure this (franchisor) flexibility does not frustrate the purposes** of this legislation, the bill uses very

special enforcement mechanisms. **The burden of proof is placed upon the franchisor to prove compliance with the requirements of this legislation. In addition, because the franchisee's rights must be preserved, pending litigation, if his ultimate victory is to be meaningful, PRELIMINARY INJUNCTIVE RELIEF IS MADE AVAILABLE TO THE FRANCHISEE AS A MATTER OF RIGHT UPON A VERY MINIMAL SHOWING."** **Cong. Record, April 5, 1977 @ p. 10383 (remarks of Chairman Dingell, author of the PMPA.)**

The enforcement provisions of the proposed PMPA were most objectionable to the oil companies.

it has consistently been held that as remedial legislation, the Act must be

given a liberal construction consistent with its goal of protecting franchisees." Id. See, Barnes v. Gulf Oil Corp., 824 F.2d 300, 306 (4th Cir. 1987).

Regrettably, what appears to be an attempt to engraft a law review article into a statute, where the concept in the article was expressly rejected by the drafters of the statute, i.e: placing the burden of proof on the franchisee; does not comport with legislative intent, creates conflict in the Circuits, and requires resolution by this Court.

III. **The Structure of the PMPA**

The principal substantive provision of the PMPA is found at 15 USC 2801 (a) - the general prohibition

of ALL terminations of franchises or non-renewal of franchise relationships.

Under Section 2805, the enforcement provision, once the franchisee shows an attempted termination or non-renewal has occurred, the burden shifts to the franchisor can prove as an affirmative defense pursuant to 15 U.S.C. 2805(c), that one of the statutorily enumerated grounds or exceptions to the rule against termination or non-renewal, (See, 15 USC 2802(b)) for non-renewal or termination do in fact exist.

Even if the franchisor shows that an affirmative defense may exist, the plain language of the statute, 15 USC 2802(b)(2)(B) shows that the

franchisor still does not prevail.

As set forth by the 9th Circuit in Reyes v. Atlantic Richfield Co., 12 F.3rd 1464 (9th Cir. 1993):

"...under the explicit language of the statute, a franchisor must not only show that there was a legitimate reason for the termination or non-renewal, he must also demonstrate that this reason was in fact the ground for the termination or non-renewal decision.

Under the PMPA the franchisee has the initial burden of proving his franchise was not renewed. 15 USC 2805(c). The burden then shifts to the franchisor to demonstrate that the non-renewal was proper under the PMPA. 15 USC 2802(b)(1)(B). The PMPA

prohibits the termination or non-renewal of any gasoline industry franchise unless "such termination is based upon a ground" described in the PMPA. 15 USC 2802(b)(1)(B).... ."

{ARCO established in that case that the franchise has failed to comply with a provision of the franchise that was both reasonable and materially significant to the franchise relationship.}

"ARCO asserts that by establishing the breach, it has satisfied its entire burden.

But under the language of the section 2802(b)(1)(B), Arco is only half done; ARCO must also establish that the "termination or non-renewal is <u>based upon</u> the breach. This second-

half of the franchisor's burden is met by introducing evidence that the non-renewal was in fact based upon the breach.

The next question is whether the franchisee is free to rebut this element of the franchisor's case by producing evidence that the termination was in fact based on an illegitimate reason. The answer is yes.

THERE IS NO PROVISION IN THE PMPA PROVIDING THAT THE FRANCHISOR'S PROOF OF THIS ELEMENT (i.e. that one of the affirmative defenses do in fact exist) C R E A T E S A N I R R E B U T T A B L E PRESUMPTION.(such as that under review herein). 12 F.3rd @ 1469, 1470.

The 4th Circuit finds a

presumption where other do not. Compare, Brach v. Amoco Oil Co., 677 F.2d 1214 (7th Circuit, 1982) (effect of PMPA is to create a presumption that all terminations are illegal).

PMPA is designed to allow lessee gasoline retailers to buy the franchisor's interests in the leased marketing premises whenever the franchisor decides to sell those interests, so that even though the franchisor may cease marketing gasoline, the franchisee will remain in business in order to provide price and service competition in the motor fuel marketplace. See, e.g., Slatky v. Amoco Oil Co 830 F.2d 476 (3rd Cir. in banc 1987)

Compliance with the offer

requirements of the PMPA requires not presumptions, but economic and factual proof that: (1) That the franchisor offer the property so as to evidence a sincere desire to sell the property, meaning that the franchisor must sincerely believe that the price term meets or very nearly approaches the fair market value of the property; See, e.g. Slatky v. Amoco, 830 F.2d at 485 (3rd Cir.in banc 1987);

(2) Even if the franchisor has such a sincere belief, the offer must be determined to be objectively reasonable, that is it must actually meet, or very nearly approach the objectively determined fair market value. Slatky, supra.

(3) The offer may not be hinged with

unreasonable conditions of sale, Slatky v. Amoco Oil Co.; 830 F.2d 476, 484 n.7.

The Fourth Circuit holding that such factual inquiry is foreclosed rests upon the failure to recognize the critical distinction between the decision by the oil company to sell its interests in the leased marketing premises; and the offer to sell such interests.

The former, the decision to sell, is evaluated under a subjective good faith standard: that is judicial scrutiny is limited to whether the decision was made in good faith and the normal course of business. All courts agree on that point.

The conflict created by the 4th

Circuit in this case through this "presumption"; extends to the 8th Circuit and 10th Circuits, as well as the in banc 3rd Circuit decision upon which it purports to rely.

Offers to sell are not voluntary business judgments made by franchisors, rather they are compliance judgments required by the plain language of the statute.

"Like a termination or non-renewal decision for franchisee misconduct, the determination of an offer price is NOT A BUSINESS DECISION. IT IS NOT A DECISION THAT THE DISTRIBUTOR DECIDES ON ITS OWN TO MAKE. RATHER THE DISTRIBUTOR SETS A BONA FIDE PRICE ONLY BECAUSE THE STATUTE REQUIRES IT TO DO SO.

Indeed, when a distributor fails to renew a franchise because of a decision to convert a property to a different use, or to alter the premises, see 2802 (b)(3)(D)(i)(I)(II), selling the property will interfere with its business plans. The determination of an offer price therefore represents something we may call a "compliance judgment", a judgment about how to best protect the company's interests while complying with the statute. CONGRESS DID NOT INSTRUCT THE COURTS TO DEFER TO SUCH DECISIONS."

Slatky v. Amoco Oil Co. 830 F.2d 476 at 481 (3rd Cir. in banc

This critical distinction recognized by the Third Circuit in

Slatky was first articulated by the Eighth Circuit in Roberts v. Amoco, 740 F.2d 602 (8th Cir. 1984), which expressly held that " the question of whether an offer is legitimate is separate and distinct from the question of whether the decision is not to renew was in "good faith and the normal course of business." Roberts, supra, 740 F.2d at 606...any general business judgments underlying the terms of the offer, such as Amoco's alleged concern for avoiding future liability or environmental damage arising from leaking underground storage tanks do not make an otherwise deficient effort bona fide. Id. @ 607.

By contrast, the majority opinion

of the 4th Circuit cites Slatky in its decision, 32 F.3rd @ 130, but then decides that the PMPA was designed to ensure that " sound business judgment does not become a casualty of constant judicial oversight " and that application of its newly discovered presumption comports with a "desire, (nowhere to be found in the statute, its legislative history, or the opinions of sister Circuits); that a simple statutory provision not be turned into a complex and cumbersome one necessitating a detailed economic analysis of private decision making."

This is nonsense. Congress fully intended that the offer terms be strictly scrutinized; and this Court has repeatedly made clear that in

construing other trade regulation statutes, such as the antitrust laws; economic reality is to be the touchstone of the analysis.

The opinion of the 4th Circuit is untenable and certiorari should be granted.

IV. ENFORCEMENT ISSUES

The plain language of the statute places a heavy burden on Exxon, and any other franchisor. The radical changes PMPA makes in both shifting of the burden of the burden of proof.

The " presumption of compliance" was, as Judge Murnaghan noted "created out of whole cloth" 32 F.3rd @ 133, - it is not to be found in the PMPA or its legislative history, and is fatally undercut by decisions such as

Slatky and Ellis upon which it purports to rely.

We have an Exxon distributor, who would have continued to operate the location as an Exxon station, thus enjoying the fruits of Mr. Keener's labor in building up the value of the Exxon brand in that location, who would have been purchasing gasoline at cheap rack prices, and who could have enjoyed financial deals, all of which were not offered to Petitioner.

For Exxon and other oil companies to meet the burden of proof imposed upon them by Congress over their objections, offers of rights of first refusal must be subject to economic analysis, not judicial legislating.

Finally we note that the 4th Circuit panel majority held that the presumption was justified because "early resolution of claims is of special significance in the PMPA context, and a presumption of statutory compliance facilitates that end." (Appendix to Petition, p.8a)

This is also nonsense.

Congress radically altered the preliminary injunction standard in order to keep the dealer in business while the litigation proceeds, not to have early resolutions.

The conflict in the Courts this raises is best shown by in Hilo v. Exxon Corp., 997 F.2d. 641, 643 (9th Cir. 1993):

"Our general approach to the

construction and application of the PMPA is well established. As we recently observed "the overriding purpose of the PMPA is to protect the franchisee's reasonable expectation of continuing the franchise relationship."

Ellis v. Mobil Oil Corp. 969 F.2d 784,788 (9th Cir.1992) (quoting Slatky v. Amoco Oil Co., 830 F.2d 476, 484 (3rd Cir. en banc 1987).

In addition as remedial legislation, the Act must be given a liberal construction consistent with its goal of protecting franchisees." Humboldt Oil Co. v. Exxon Co. USA, 695 F.2d 386, 389 (9th Cir. 1982)."

More particularly, we have recognized that "the test for a

preliminary injunction under the PMPA is more liberal than that in the general run of cases."

The Hilo Court further held:

"Preliminary relief in order to maintain the status quo may be necessary, for example, to effectuate the protection of the bona fide offer provisions in Section 2802 (b)(2)(E)(iii), despite the unquestioned good faith of the franchisor. As we explained in Ellis:

"When a franchisor decides for legitimate business reasons not to renew a relationship, the franchisor must give the franchisee a bona fide offer to purchase the station. The offer to buy at fair market value serves as a second and distinct layer

of protection, assuring the franchisee an opportunity to continue to earn a living from the property, while permitting the distributor to recover the fair market value of the property sold and to end the franchise relationship." 969 F.2d.@ 788.

The "sale" exception to the PMPA's general rule against termination or non-renewal requires the franchisor, Exxon, to prove that it either made a "bona fide" offer to sell the property the dealer at the location; or that it gave him the right to match such a "bona fide" offer made by another.

The offer is for the FRANCHISOR'S interests (feehold or leasehold) in the leased marketing PREMISES. 15 USC

1802(b)(3)(D).

The highlighted language makes two critical points. First, the term "interests in leased marketing premises" shows that what the franchisor must offer to sell on reasonable terms and conditions is its interest, be it feehold or leasehold, in the land.

PMPA, by its plain terms, does not allow a franchisor to force the franchisee to pay a business value premium.

Moreover, the statute states that the franchisor can sell only ITS interest in the premises, not the business value built up by hardworking local dealers such as Mr. Keener.

SUMMARY AND CONCLUSION

The 4th Circuit decision has powerful implications on a matter of great significance in the real world. At this moment hundreds, if not thousands of station properties are on the market.

They must be offered to the dealers in accordance with the PMPA. The PMPA places a heavy burden on franchisors that can be meet only through sound legal and economic analysis, not through judicial legislating, particularly legislating rejected by Congress.

The decision under review conflicts with the decisions at least 5 other Circuits, as well as the most recent trade regulation and antitrust decisions of this Court.

Accordingly; the SSDA believes that the writ should be granted.

Respectfully submitted;

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